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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 555

HARRY F. SINCLAIR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON CERTIFICATE FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MOTION TO BRING UP THE WHOLE RECORD AND CAUSE AND BRIEF SUR SAME

Now comes the United States of America, Appellee in this cause in the Court of Appeals of the District of Columbia, which is now pending in this Court on questions certified by the Court of Appeals of the District of Columbia, and respectfully moves that this Honorable Court issue its writ of certiorari commanding that court to certify and send to this Court a true and complete transcript of the record in this cause, said cause being No. 4681 on the docket of said Court of Appeals of the Dis-

trict of Columbia, so that this Court may consider and decide the whole matter in controversy, as upon appeal.

A transcript of this record together with nine printed copies have been lodged with the Clerk of this Court as exhibits to this motion.

This cause involves the validity of the conviction of Appellant for violation of Section 102 of the United States Revised Statutes in refusing to answer four questions propounded by the Committee on Public Lands and Surveys of the Senate of the United States during its investigation of leases upon Naval Petroleum Reserves. An investigation of the record will show that this motion should be granted for the following reasons:

(1) The certificate of the Court of Appeals of the District of Columbia to this Court does not contain a statement of all facts upon which the ultimate disposition of the case depends.

(2) The questions so certified do not include all questions raised by counsel, and, therefore, determination of the questions certified may not end proceedings in the cause.

(3) The consideration by this Court of the entire record tendered herewith will require but little more labor and search than is involved in the examination of the certificate of the Court of Appeals of the District of Columbia, in order to answer the questions certified; and such consideration of the entire record will not only enable this Court to determine more effectively the questions certified

to it, but will also make any further appeal to this Court unnecessary.

(4) The public interests will be promoted by prompt settlement in this Court of the entire case in one proceeding and hearing.

The reasons are elaborated in the brief which follows.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel for the United States.

BRIEF

I. SUMMARY OF FACTS AND QUESTIONS CERTIFIED

The certificate of the Court of Appeals of the District of Columbia finds that Appellant was indicted for violation of Section 102 R. S. U. S. providing for the punishment of a person who having been summoned as a witness by authority of either House of Congress to give testimony upon any matter under inquiry before any Committee thereof wilfully makes default or who having appeared refuses to answer any questions pertinent to the question under inquiry shall be punished. The attention of the Senate had been directed to certain leases of Naval Petroleum Reserve lands, including the Teapot Dome lease to a company represented by Sinclair and to alleged fraud and illegality in connection therewith.

In April, 1922, the Senate authorized its Committee on Public Lands to investigate the entire subject of leases upon Naval Oil Reserves with par-

ticular reference to the protection of the rights of the United States and the preservation of its natural resources. In June, 1922, the Senate specifically authorized the Committee to require the attendance of witnesses and administer oaths to witnesses. In February, 1923, the Senate continued the foregoing resolutions in effect until otherwise ordered. In February, 1924, the Senate further specifically authorized the Committee to ascertain what if any other additional legislation may be advisable. One day later the Senate adopted a resolution finding certain leases fraudulent and unlawful and directed institution of suits for cancellation of the leases and such criminal proceedings as may be warranted.

On March 19th, 1924, the Committee summoned Sinclair to appear on March 22nd, and he appeared on that date. When he appeared, he first disclaimed expressly any reliance upon his privilege against self-incrimination. He then stated that he had testified concerning his Company's leases before a Senate Committee in January, 1923, and had testified concerning it before the Committee on Public Lands on four previous occasions and days. He referred to the resolutions of the Senate in effect at the time of his previous appearances, called attention to the passage of the Senate resolution directing institution of civil and criminal proceedings, the appointment of special counsel thereunder, the filing of a Bill in Equity against

his companies for the cancellation of the lease and dependent contracts upon the grounds that they were fraudulent and unlawful, and claimed that the Public Lands Committee had been thereby deprived of jurisdiction.

Thereupon, one Senator member of the Committee moved that further examination of Sinclair not relate to any matter pending in Court in which Sinclair may be a defendant. That led to a discussion in which one Senator said the Committee had no interest in anything except the cases before the Court. Another said that it did have, and several others said that it didn't matter whether the questions which should be proposed did or did not relate to the matters pending in court. The motion of the Senator confining the inquiry to matters not pending in court was voted down. One Senator or another then asked Sinclair various questions which he refused to answer. His contumacy was referred to the United States District Attorney for the District of Columbia and an indictment returned by the grand jury in ten counts and Sinclair was convicted on the first, fourth, fifth, and ninth counts.

The question involved in the first count was in substance that Mr. Sinclair should tell the Committee about a contract between himself and a Mr. Bonfils touching Teapot Dome. The question involved in the fourth count was in effect that Sinclair should tell the Committee about that agree-

ment between himself, Secretary Fall and a Mr. Shaffer under which Mr. Shaffer was to receive a lease upon a certain portion of Teapot Dome. The question involved in the fifth count was in substance that Sinclair should tell the Committee where and when he had met Secretary Fall during November and December of 1923. The question involved in the ninth count was in substance that Sinclair should tell the Committee whether he or any of his companies had at any time and in any way given or loaned anything to Secretary Fall.

The trial court in submitting the case to the jury instructed it to decide four questions as questions of fact, as follows: Whether Sinclair was summoned; whether he appeared; whether he was sworn and whether he was asked the foregoing questions and refused to answer. The jury returned a verdict of guilty and Sinclair has been sentenced.

Upon the foregoing findings of fact, the Court of Appeals certified the following five questions, namely:

(1) "May a witness summoned before a Committee of Congress to testify in an inquiry being conducted in aid of legislation lawfully refuse to answer questions which call for the disclosure of the private affairs of the witness?"

(2) "May such a witness refuse to answer questions directed to matters wherein relief or redress could be had only by a judicial proceeding?"

(3) "Would a witness, if it appears that the inquiry, though authorized in aid of legislation, is in

fact directed to matters which have been referred by Congress to the courts, and in which relief or redress can be had only by a judicial proceeding, and in which proceeding the witness is a defendant, be justified in refusing to answer questions directed to the matters so referred and pending in the courts?"

(4) "Was the issue of the pertinency of the questions propounded to Mr. Sinclair to the investigation being conducted by the Committee of the Senate a mixed question of law and fact for the determination of the court and jury, or was it solely a question of law?"

(5) "May a witness, who is alleged to have been a party to a conspiracy to defraud the United States through certain contracts and against whom judicial proceedings have been instituted, refuse to answer questions propounded by a duly authorized Senate Committee in so far as the questions involve the connection of the witness with the contracts forming the basis of the judicial proceeding?"

II. SUMMARY OF ADDITIONAL FACTS AND QUESTIONS WHICH MAY APPEAR PERTINENT ON THE FACE OF THE WHOLE RECORD

The inquiry of the Senate Committee related to lands which had been set aside as petroleum reserves "to be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by Act of Congress" (R. 65–70) and to the sufficiency of acts of Congress for

the administration and protection thereof (R. 70–75).

The acts of Congress gave the Secretary of the Interior jurisdiction to pass upon pending mineral claims upon lands in the Reserves, but otherwise control was vested in the Secretary of the Navy. Subsequently, the President by executive order transferred the entire control over the Naval Petroleum Reserves to the Secretary of the Interior. (R. 75–76.) Leases of all the lands in Reserves 1, 2, and 3 had been made—Reserve 3 being leased to a Sinclair company upon terms which violated not only the acts of Congress relating specifically to the administration of the Reserves but also general acts.

Evidence was introduced that Sinclair was subpenaed to appear at the time he did appear and refused to answer the foregoing questions which evidence of summons was not contradicted. (R. 82–83.) Evidence of the asking of the questions and the refusal of Sinclair to answer was introduced and not contradicted. (R. 83–89.) Evidence that Sinclair was sworn as a witness was introduced and not contradicted. (R. 88–89.) His counsel, Mr. Littleton, stated to the Committee in the course of the proceedings on March 22nd, 1924: "Mr. Chairman: Would I be out of order if I suggest that Mr. Sinclair is already under oath before the Committee, so when you say 'call and swear him,' that is technically inaccurate?" Evidence that the Committee was sitting pursuant to

the foregoing resolutions at the time the questions were asked of Sinclair and at the time he refused to answer them was introduced and not contradicted. (R. 88–89.)

Defendant offered in evidence the testimony of Sinclair before the Committee on October 29th, 1923, which pertained to Sinclair's connection with the Mammoth Oil Company, one of the lessees of the reserves, its capital structure, manner in which it acquired placer mining claims, dealings in and manipulations of the stock of the Mammoth Oil Company, a few of the details of the negotiation of the lease, Sinclair's appraisal of the value of the lease, a few of the details of operation under the lease and a few questions as to Sinclair's contributions to political party campaign funds. This offer was objected to by counsel for the government and excluded by the court. Later, the court admitted the foregoing testimony of Sinclair before the Committee and also proceedings of the Committee on March 22nd, 1924, for the purpose of the determination by the court as a matter of law of the questions as to whether the questions involved in four counts on which Appellant was found guilty were pertinent to the matter under inquiry by the Committee. (R. 115.)

The defendant then offered extracts from the Bill of the United States to cancel the lease and contract of The Mammoth Company in which fraud, conspiracy, and illegality were alleged. (R. 128–129.)

Defendant offered evidence that the Sixty-Eighth Congress assembled December 3rd, 1923; that Fall resigned as Secretary of the Interior on March 4th, 1923, and that the Senate had passed a resolution directing the institution of civil and criminal proceedings. None of the evidence offered by the Defendant as stated hereinbefore was offered in the presence of the jury. Further, in the absence of the jury Defendant offered testimony of his attorney, Mr. Littleton, to the effect that he had advised Mr. Sinclair to make the statement which he made to the Committee on March 22nd, 1924, as stated hereinbefore.

The Court took the foregoing various offers of the Defendant under advisement and later determined, as a matter of law, that the questions in the four counts, under which Defendant was found guilty, were pertinent to the inquiry before the Senate Committee; that the colloquy among members of the Committee and Mr. Littleton on March 22d, 1924, the entire statement of Mr. Sinclair at that time and such paragraphs of the Bill of Complaint against the Mammoth Oil Company as the Defendant desired to offer should be admitted and they were read to the jury. Evidence that the Sixty-eighth Congress assembled on December 3d, 1923, and that Fall resigned as Secretary of the Interior on March 4th, 1923, was admitted. (R. 138–139.)

The offered testimony of Mr. Littleton and the offered report of the hearing on October 29th, 1923, were excluded. (R. 139.)

The Defendant offered thirty-four prayers for instructions to the jury. Two were withdrawn, three were given, and the remainder denied.

The Defendant took forty-six assignments of error to the proceedings in the trial court. And it should be stated that Defendant had demurred to the indictment specifying fourteen grounds and had moved to quash the indictment specifying four grounds. Both the demurrer and motion to quash were overruled by the court as to the four counts on which the Defendant was found guilty.

The Appellant's brief in the Court of Appeals groups the errors relied upon as follows:

> 1. The indictment is bad for failure to state a crime, and for lack of certainty;
>
> 2. A verdict for the defendant should have been instructed. *A*. There was no proof of an authorized inquiry, a legal summons, or duly administered oath. *B*. There was no proof that the questions propounded were questions of the Committee. *C*. There was no proof that the questions were pertinent.
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> Assignments of error No. 1 to 8, inclusive, and 12 to 16, inclusive, being errors in denying defendant's motion for a directed verdict for the reasons stated in such assignments.
>
> 3. The refusal of the Court to submit to the jury all the essential ingredients of the crime was a denial of the right to trial by jury.

Assignments of error No. 9, 10, 17, 21 to 27, inclusive, 31 to 42, inclusive, 44 and 45 relating to the refusal of the Court to submit to the jury matters held by the court to be matters of law for its decision and instructions given and refused with respect thereto.

4. The court erred in excluding defendant's evidence of lack of wilfullness.

Assignments of error No. 9, 10, 11, 18, 19, 20, 28, 29, 40, 43, and 46 being errors in excluding evidence tendered by the defendant, errors in charges to the jury and in refusing to give charges requested.

III. REASONS WHY THE WHOLE RECORD AND CAUSE SHOULD BE BROUGHT UP

It is apparent from a comparison of the facts certified with the additional facts in evidence that the Court of Appeals has failed to make findings in its certificate upon many of the facts in evidence. The five questions certified are abstract and academic unless they be determined with relation to all the facts and issues of the case. Answers to the questions will only partially meet the demands of justice and public interest unless they be determined with relation to the facts and issues of the case.

When all the facts in evidence are considered it will appear that of the five questions certified only the fourth correctly states an ultimate issue of law.

The first question certified does not include the premise that the witness in this case did appear

before the Committee, the premise that the facts sought to be elicited related to public affairs as well as the private affairs of the witness, the premise that the private affairs called for were not claimed by the witness to be trade or business secrets, or the premise that the witness had expressly disclaimed reliance on his privilege against self-incrimination.

The second question certified does not include the premise that the same matters for which relief or redress could be had only by a judicial proceeding may suggest the desirability of additional legislation for future cases and for the future governance of executive departments of the government.

The third question certified is based upon the premises of the first and second questions and omits the necessary premises just referred to.

The fourth question certified, if considered in the light of all the facts instead of only those on which the Court made findings and if considered in the light of the course of the entire proceeding correctly states a question of law applicable to the ultimate disposition of the cause.

The fifth question certified as well as the third question assumes that the witness was a defendant in judicial proceedings then pending where no proceedings were pending against the witness Sinclair, Appellant herein. The only proceeding then pending was a civil action against a corporation with which Sinclair was connected and a general grand

jury investigation of the subjects referred to in Senate Resolution 54. Question 5 also omits the necessary premises just mentioned in our comments upon the other questions certified.

It will require but little more labor and search on the part of this Court to take up and consider the entire record of this case, inasmuch as the major portion of the record is devoted to proofs dealing with the facts set forth by the Court of Appeals of the District of Columbia in its statement of facts in the certificate to this Court. Comparatively few pages are given to the proofs regarding the additional facts and pertinent questions that are above summarized. A search and examination of these additional portions of the record will enable this Court to determine far more effectively not only the questions certified to it but the fundamental legal questions involved in this appeal.

The five questions certified, if they were properly framed to include all necessary premises, would relate to some but not all the points and assignments of error argued by Appellant in the Court of Appeals. In fact the questions certified relate only to Appellant's Point 2–C and Point 3. They do not relate to Appellant's Point 1, Point 2–A, Point 2–B or Point 4. Should this Court answer the questions certified in a way which is favorable to the government, the defendant may nevertheless endeavor to have this Court review the other points relied upon. Speed in administration of justice as well as economy of effort for the Court and counsel

will be promoted if the Court grants the foregoing motion.

WHEREFORE Appellee respectfully repeats its prayer that this Honorable Court issue its writ of certiorari commanding the Court of Appeals of the District of Columbia to certify and send to this Court a true and complete record of the above entitled cause so that this Court may consider and decide the whole matter in controversy as upon appeal.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel for the United States.

ACKNOWLEDGMENT

Receipt of copies of the foregoing motion and brief, and service of notice of filing thereof, and of intention to present the same in open court on January 2, 1929, or as soon thereafter as the Court will hear the same, is hereby acknowledged. Dated December ——, 1928.

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Attorneys for Harry F. Sinclair, Appellant.